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No. 06-1317

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JEFFREY DEVAN LEONARD,
Petitioner,

v.

THOMAS SIMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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May 14, 2007

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ARGUMENT

The petition for certiorari seeks review of a case in which "trial counsel in a capital murder prosecution made absolutely no preparation and no investigation for the penalty phase of the trial." Pet. App. 192a. As a result, "a 20-year-old, African American male, with no prior violent felony history, was sentenced to death by a jury that did not know his true background, family and social history, or even his true name." Pet. App. 196a. The State's opposition to the petition is (at best) cavalier. Rather than offer case citations or argument, the State devotes most of its brief to bizarre insinuations about Leonard's petition, *see* Opp. 1-2, notwithstanding that the petition was correctly captioned and complied with this Court's rules of practice. At this point in the proceedings, possibly the last chapter before the issuance of a death warrant, a condemned prisoner deserves better than the nonchalant response the State offers here. This is particularly so given that there is no genuine dispute on the core point that petitioner Leonard received shockingly inadequate representation at sentencing — as even the Sixth Circuit majority below held — and given that Leonard's petition for rehearing resulted in a "seven to seven stalemate" in the Court of Appeals, Pet. App. 254a, with at least five federal appellate judges (as well as a federal district judge) concluding that Leonard was prejudiced by his lawyer's failure to discharge even the most basic professional responsibilities to his client.

1. Perhaps the only clear aspect of the State's opposition is what it *fails* to say. The State nowhere contests that the Circuits are intractably divided on when a constitutionally deficient counsel's failure to present mitigation evidence prejudices a defendant under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. 17-24. The State agrees with Leonard that the Sixth Circuit disregards undiscovered mitigation

evidence unless the evidence "*differ[s] in a substantial way — in strength and subject matter*" from the evidence presented at sentencing. Opp. 9-10 (quoting *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006) (alteration added)); Pet. 18. Thus, the State embraces the petition's contention that the Sixth Circuit, along with the Fourth and Fifth Circuits, will find no prejudice as long as some subset of the existing mitigation evidence has previously found its way to the sentencing jury's ears. Pet. 18-21. The Third, Ninth, and Tenth Circuits have rejected this incorrect application of *Strickland* and will find prejudice when there is a reasonable probability that the jury, having heard the omitted evidence (along with the evidence adduced at sentencing), would not have imposed the death penalty. Pet. 17, 22-23. There is, in short, an undeniable conflict between the Circuits on the proper application of *Strickland*.

2. In defense of the Sixth Circuit's standard, the State weakly notes only that evidence that is "no different in strength and subject matter would be most unlikely to alter the outcome." Opp. 10. But the State misses the point: The Sixth Circuit standard precludes consideration of evidence when it fails to differ *either* in strength *or* in subject matter. As other Circuits have recognized, however, the fact that some small amount of evidence on a particular subject matter has reached the jury does not negate the prospect that a jury might reasonably have found a more robust presentation of evidence on that subject matter to be persuasive.

3. As to the particular prejudice Leonard has suffered, the State offers nothing more — but nothing less — than rank mischaracterization of the record. The State contends that Leonard's testimony at sentencing was "largely corroborated" by the state psychologist's testimony. Opp. 9. Not only is this wrong, it is a position that even the Sixth Circuit panel did not adopt. Pet. 14a-15a. Leonard testified

to some aspects of his childhood at sentencing, but the state psychologist, who only met Leonard as an adult, could not have and did not provide independent "corroboration" of Leonard's testimony regarding his family. The only witnesses who could have testified from personal knowledge as to the brutality and deprivation of Leonard's childhood were prevented from offering their testimony by the egregiously deficient performance of Leonard's counsel. Pet. App. 192a-196a. As a result, the sentencing jury heard no corroboration at all of Leonard's testimony regarding his childhood abuse and neglect. The State fails even to acknowledge this Court's holding that a defendant's testimony in his own favor is bound to be discounted by a jury. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

Moreover, the State entirely ignores the other consequences of trial counsel's failures. Thus, the State (like the Sixth Circuit) ignores that the absence of family members deprived Leonard of testimony that would have humanized him, thus leaving the jury with the misimpression that even Leonard's own family supported his execution. *See* Pet. 26 (describing different treatments in the Courts of Appeals of this issue). And the State (like the Sixth Circuit) ignores that counsel's reliance on the State psychologist — who had evaluated Leonard only for his competency to stand trial — actually resulted in the introduction of testimony that was both affirmatively harmful and medically erroneous, and deprived the jury of a full picture of Leonard's substantial psychological and neurological problems. *See Abdul-Kabir v. Quarterman*, 550 U. S. ___ (2007) (slip op. at 27) (noting that "possible neurological damage" is powerful mitigating evidence).

In short, there is no basis for denying that the Sixth Circuit applied its restrictive analysis in Leonard's case and, as a result, treated as "cumulative" the testimony from

Slaughter's family members and the newly available expert testimony on the consequences of Slaughter's childhood brain injury. Pet. App. 14a-15a. The Sixth Circuit's test for *Strickland* prejudice is a manifest misapplication of this Court's precedents, which require the reviewing court to consider the entire impact of all the undiscovered mitigation evidence in determining *Strickland* prejudice. *See* Pet. 27-28. The State's bare citation to *Strickland*, Opp. 9, in the course of its cursory opposition does nothing to rehabilitate the Sixth Circuit's deeply flawed adjudication of Leonard's habeas claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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